Vol. 12 No. 2 ISSN: 0976-3570

BOOK REVIEW

THE POWER OF PRECEDENT, by Michael J. Gerhardt. New York: Oxford University Press, 2008

Suparna Bandyopadhyay[1]

The author Michael J. Gerhardtin his book has lucidly examined and defined the concept of precedent existing in U.S. legal system. The author stated, any past constitutional opinions, decisions, or events which the Supreme Court or non-judicial authorities make with normative authority are called precedent. The author hasthoroughly examined precedent and proposed a positive as well as negative meaning of itby dividing it among the people who believe precedent to be meaningful which has a legal force and those who believe precedent to be meaningless without any legal force. But the author was more inclined towards the idea of having a binding authority of precedent. In which he further stated that the judges must treat others' precedent or judgmentsin such a manner as they wish their own judgments to be treated. In addition to the bindingness of precedentthe author, heexaminedthe Courts of U.S. also starting from Marshall Court (1801- 1835) followed by Taney Court (1836-1864), Chase Court (1864-1873), Waite Court (1874-1888), Fuller Court (1888-1910), White Court (1910-1921), Taft Court (1921-1930), Charles Evan Hughes Court (1930-1941), Stone Court (1941-1946), Vinson Court (1946- 1953), Warren Court (1953-1969), Berger Court (1969-1986), Rehnquist Court (1986-2005)and Robert's Courts in post-2005.[2]While discussing the Courts the author emphasized that the judges in 19th century were reluctant to overrule precedents. As a result, negligible numbers of cases have been overruled till 1930. But from the Hughes Court, a significant number of overruling has been noted. Hence, it can be presumed that the courts of initial period were conservative in nature; they neither questioned nor voted to overturn any of the court's prior constitutional decision which somehow exhibited the importance of collegiality and their respect towards the

[1]Teaching Assistant, University of North Bengal, Department of Law

[2] These are the U.S. Court system beginning from 1801 which was identified by the last name of the presiding chief judges of the relevant time period.

tradition of precedent. In the later instances of courts, post-1930 the judges gave importance to the individual liberties and progressiveness of law which may get deviated from precedent for the sake of justice which altogether does not amount to disrespect precedent. Hence, as per the author, the real nature of constitutional adjudication and the negligible number of overrulingas demonstrated by the U.S. Courts shows the constructive authority of precedent not the destruction of the very institution of precedent.

Therefore, the book is multi-dimensional which not only focuses the Supreme Courts and the cases pronounced by it but also the horizontal and vertical influence and significance of non-judicial precedentswhich comes from executive authorities.

In the first chapter, the author states, a basic principle of constitutional law prevails in the United States which prevents Congress from overturning the Court's constitutional decisions through ordinary legislation. So far only four Supreme Court decisions have been overturned through constitutional amendments namely, *Chisholm v. Georgia*[3], through the Eleventh Amendment; *Dred Scott v. Sandford*[4], through the Fourteenth Amendment; *Pollok v. Farmers' Loan and Trust Co.*[5], through the sixteenth Amendment; and *Oregon v. Mitchell*[6] through the Twenty-Sixth Amendment. This chapteris also comprised ofappendix and some statistical data from 1789 to 2004.During this period the Courts, in 133 cases has expressly overruled 208 precedents. The book has a detailed analysis of U.S. Supreme Courtcases only by leaving rest of the countries. Gerhardt ends the chapter by saying that precedent influences judicial reasoning and decision makingprocess but in many cases, judges do not address that influence directly.The instances of such cases have not been properly written down.

The authoremphasizedmore on the practice of retaining precedent other than overruling it. He states, the average life span of an overruled precedent is 29.2 years, which is in excess of the average length of service of a judge on the court. Indeed, 29.2 years exceeds the tenures of all chief justices, only with the

[3] U.S. 419 (1793).
[4] U.S. 393 (1856).
[5] U.S. 601 (1895).
[6] U.S. 112 (1970).

exception of the C.J. John Marshall.[7] The Marshall Court did not overturn a single constitutional precedent, though J. Joseph Story tried unsuccessfully to overturn one ruling.[8] Thereafter, the Berger's court (1969-1986) has overruled 76 precedents which were thehighest of all.

The chapter immensely deals with cases, facts, judgments andtheir ratio in terms of overruling butno such discussion has been given to the dissenting opinions. The author has discussed few case laws and role of justices from 17th century but no express mention of precedentand judgesbefore 17th century has been laid down.The chapter highlights the court systemparticularly from Marshall Court which started in 18th century.

In second chapter, the author mentioned about the theories of precedent prevailing among legal scholars and social scientists. He divided these theories into two groups: the "weak view" and the "strong view" of precedent. In the weak view of precedent, the court owes little or no respect to precedents. The strong view of precedent perceives precedent as the principal, or most meaningful, touchstone in constitutional law. Drawing on the work of Thomas Lee[9], Gerhardt traces the origins of the weak view from the writings of Blackstone along with other British writers and the judges of 17th-18th century. Gerhardt to some extent supported the opinions of Lee.Blackstone conceived the idea of precedent in terms of declaratory theory of law. Declaratory theory states, the Law had a 'Platonic or ideal existence' even before it was reduced to a judicial opinion. On this view, any decision will be deemed to be inconsistentif it does not follow the law and needed to be overruled. If a decision merely declares the law then overruling will be considered bad. Lee explains that those who shared this view believed that "a judicial decision was not law, but mere evidence of it, and accordingly could be disregarded by a subsequent court.

[7] John Marshall served as Chief Justice for 34 years and several months.

[8] Although Justice Story believed *United States v. Hudsonand Goodwin,*11 U.S.32 (1812), was wrongly decided, the Court reaffirmed the decision in *United States v. Coolidge*,14 U.S. 415, 416 (1816)

[9] Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 *Vand. L. Rev*. 647 (1999); see also Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to 'Unpublish' Opinions*, 77 *Notre Dame L. Rev*. 135 (2001).

The overruling of precedent in weak viewwas intensified in modern era. The Constitution is designed for the vicissitudes of time which must not become a code that carries the overtones of one period which may be hostile to another period. From Warren's Court *i.e.,* from 19th century the overruling of cases through rationality increased because the liberal judges followed the strong view of precedent in comparison to the conservative judges who disregarded liberal interpretation becauseweak view of precedent disregard precedent as a principle and tend to overrule it.

In criticizing the weak view, Gerhardt states, 'weak view' needs to be disregarded as it does not acknowledgethe importance ofdissenting opinions which also has the potential of becoming a law in near future.

But the idea of precedent conflicts with the primary sources of law that includes the constitution itself along with texts, natural laws, codes etc. It was pointed out by the author that the conflict may not arise because the sources fully support the lawfulness of precedent as the Constitution explicitly authorises the lawfulness of precedent through Article III. Article III of the U.S. Constitution provides that the judicial power of the U.S. extends to decide cases and controversies. But such exercise may overstep with the powers of congress by violating the principle of separation of powers. Therefore, the norms and practices of reading and writing judicial opinions are exclusively left to the judicial wing. It can exercise the power of adjudicationwith the help of precedent.

The weak view accords inadequate acceptance of precedent in constitutional adjudication. That is why the strong viewneeds to be applied. This insures values of stability and consistency. Gerhardt mentions some prominent scholars, such as Ronald Dworkin, David Strauss and Kathleen Sullivan, who argue that precedents shape constitutional doctrine over time through the force of their reasoning and logic.

Gerhardt classified social scientists who study Supreme Court cases into five groups:

(1) Attitudinalists,
(2) Rational choice theorists,
(3) Empiricists,
(4) Post-positivists and

(5) Skeptics.

Throughthis classification the author demonstrated the role of judges, their internal influences and external factors while determining precedent or overruling it. But the classifications have not been elaborated in this chapter.

In the third chapter the author proposed a moderate view of precedent as an alternative to the weak and strong perspectives which is also regarded as a 'golden rule of precedent'. This golden rule is gathered by Justices and other public officials from their experience, training, and temperament of not being disdainful of precedents or else they risk having other justices' show the same or even more, disdain for their preferred precedents. This realization leads most judges to carefully pick and choose which particular precedents to challenge. Gerhardt meantthat the 81stjudge of Supreme Court while considering an issue previously decided by the Court will not write anything anew about the issue or on a blank slate by ignoring what the previous 80th judge have saidor the next 82nd judge may say about the same issue. Gerhardt concentrates on 'historical institutionalists' who were post-positivistslike Howard Gillman. The term institutionalists illuminate the patterns in decision making that can be attributable to the Court as an institution and a judgment must reflect the historical exigencies and needs. The historical institutionalists differ from attitudinalists and rational choice theorists. Howard Gillman explains, judging in good faith is all one can expect from judges. Post-positivists have amassed considerable empirical data to support their beliefs that justices try to make the best decision possible in light of their training and sense of professional obligation who do not stick to the strict positivist approach of decision-making. While attitudinalists generally claim the Court primarily functions as a cipher for justices' expressions of their individual preferences. Attitudinalists mean a person whose happiness depends on his attitude not on his environment. Similarly, it focuses on the nature of the judge, like a sensible or a progressive judgment is often a product of a liberal or a modern judge. And rational choice theory suggests that the justices' different orderings and intensities of preference might produce inconsistent outcomes. No matter from which background a judge has come, ones he is in a position of a judge he must have rationality in his judgment.

The other group of social scientists whom Gerhardt cites as an unpersuaded by attitudinalism and rational choice theories is skeptical[10] of post-positivism. This diverse group includes, Herbert Kritzer, Mark Richards, Lawrence Baum, Cass Sunstein, Stefanie Lindquist and Frank Cross. Their approaches and results differ, but they all share the conclusion- existing models of precedent which inadequately express its authentic dynamics and effects in judicial decision making.

According to Gerhardt, the best conception of precedent in the Supreme Court should acknowledge its "limited path dependency". This means the judges while pronouncing law must incline or depend onto the path taken by their predecessors. This involves five prerequisites namely- Permanence, Sequentialism, Consistency, Compulsion and Predictibility. In **permanence** author argued that in some of the cases the court showed no intentionto revisit the landmark decisions, including those upholding the incorporation of most of the Bill of Rights through the Fourteenth Amendment due process clause. Nor does it show any inclination to reconsider its decisions by upholding the constitutionality of the Voting Rights Act, 1964, Civil Rights Actor landmark environmental regulations because a revisit might disrespect the past decision itself. These are some examples of precedents that have been widely accepted by the Court, government, and the society which are immune to modifications.

The second prerequisite is **sequentialism**. This philosophy suggests that the cases should get decided in proper order or sequence so that the Court can influence the outcomes. Sequentialism presupposes that what came before the court has some definite or measurable effects on what comes after. It is, however, impossible to prove sequentialism determines specific outcomes but it is very much obvious that the past cases through proper sequence of years, facts, background and judge's ratiogives assurance as on how to impart justice today in a better way.

In the third prerequisite, the author said **consistency** is required in precedents to fit it logically or coherently into particular lines of decisions. Consistency ensures that the precedents in areas of constitutional law are analogous to each other and are based on similar reasoning.

[10]A skeptic is a person who doesn't believe something is true unless they see evidence.

The fourth prerequisite is **compulsion** which compels judges to deviate from precedent or overrule them if found irrational or error of law.

The final and fifth prerequisite is **predictability** which creates likelihood that past choices make forecasting of future easier. Predictability states, the choices judges make, it creates expectations about the path of constitutional adjudication and these expectations are largely justified and realized. Hence, a case with the same fact creates predictability that a future case with the same fact may have similar decision. But the same path is not always possible to follow. For instance, since the Court reaffirmed *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[11], it has not allowed challenges to *Roe* as many Court observers would have predicted.

Here, the author deviated the work from 'dependency path of precedent' to 'limited dependency path of precedent'as best suited. It expressed eight related factors to generate limited dependency path, those are:

(1) Constitutional design which gives separation of power and overlapping of the same;
(2) Peculiar nature of constitutional adjudication;
(3) How the Court frames its judgments;
(4) Entrenchment in Constitutional law;
(5) Changes in the Court's composition;
(6) The dynamics of the Court as a multi-membered institution that makes decisions by majority vote;
(7) Absence of formal rules for construing precedents; and
(8) X factor- social, economic and political forces that influence the justices' reasoning in various ways.

Gerhardt clarifies that the social scientists have the wrong paradigm in mind when they analyze courts. They presume that the Court functions like a legislature. Legislators are directly subject to political pressure and accountability, but justices are not. Courts interpret law in various forms in order to resolve disputes. Gerhardt criticizes scholars who treat constitutional and common law adjudication similarly. In common-law adjudication,

[11] 505 U.S. 833 (1992).

precedents play a vital role, because the arguments are majorly based on pre-incident. In constitutional adjudication, arguments are based not only on precedent, but also on other conventional modes of constitutional discourse like text, original meaning, structure, moral reasoning, and consequences. But the claim that precedents are the exclusive source of legal authority is historically, legally and politically untenable because legislative enactments also had and have a significant effect on the U.S. legal system. This makes U.S. a common law country with a feature of precedent as one of its legal source. To the contrary the author has not made any detailed distinction of common- law and civil-law legal systems rather; he has restricted himself to the U.S. legal system only.

In Chapter four, Gerhardt examines non-judicial precedent. Non-judicial precedent is technically a constitutional judgment made by a non-judicial public authority, which is claimed or treated as a norm by that authority. Gerhardt not only considers judicial authority but also anon-judicial authority, a competent organ to produce precedent. It ranges from presidential signing statements to the use of senatorial courtesy and most of these non-judicial precedents remain undisturbed by the Court. This indirectly indicates that most of the laws having constitutional significance is not, made by the judicial wing. Gerhardt considers discoverability a distinct characteristic of non-judicial precedent. Discoverability is the effort of public authorities to discover their past governmental action and enforce it with normative authority. Until and unless an act is discovered it will be impossible to regard it as precedent because nobody will know about it.

In order to simplify the meaning of non-judicial precedents Gerhardt has given three examples of it which over the time get invested with normative precedential force: vice-presidential succession to the presidency, presidential signing statements and the non-impeachability of Congressmen. The Constitutional institutions that create them are congress, president, cabinet officials, and head of the federal agencies. It also includes state and local officials- governors, state legislatures, and mayors who have power to make precedent. The most complicated examples of non-judicial precedent that Gerhardt considers are the actions of congress to censure a president, majority rule in the Senate and treaty authorization by the Senate as a prerequisite for presidential commitments of military forces. But these cases demonstrate the

difficulties of discovering precedents when there are incomplete historical records, conflicting precedents and few citations to establish precedential authority.

There is a problem with Gerhardt's analysis of non-judicial precedent. Gerhardt defines precedent in a judicial context as a golden rule. So, when he discusses discoverability as a distinctive feature of non-judicial precedent, it is not clear whether it is to replace the golden rule as the definition of non-judicial precedent.

According to a prevalent view, if a precedent is a judicial norm then judges has the obligation to follow it. But how the executive and legislature act towards non-judicial precedent, are they obliged to follow it or not are still not clear. There is an unexplained contention that if a conflict arises between the legislative, executive or judiciary branch *i.e.,* in between non-judicial and judicial precedent then which branch will prevail. In connection with this point, Gerhardt later mentions the famous instances of *United States v.Nixon*[12] and C*linton v. Jones*[13] in which the Court refused to accept the non-judicial precedent set by presidents to have an absolute privilege to maintain confidentiality of internal White House communications. Hence, by rejecting the principle of absolute privilege, the court recognized the principle of qualified privilege where information needs to be disclosed if not communicated in public interest.

In response to these doubts and contentions, Gerhardt notes that certain non-judicial precedents are constitutionally established, and the Court's authority to review is also constitutionally limited as they possess limited path dependency. Gerhardt categorized non-judicial precedents under vertical-vertical head (binding authority within the branch creating them and on other branches), vertical-horizontal head(binding within the branch that created them but persuasive in other branches), horizontal-horizontal head (persuasive within the authority creating them and in other branches, such as the tradition of selecting a Chief Justice from outside the Court), and horizontal-vertical head(persuasive authority within the institution that created them but binding on other institutions).

[12]418 U.S. 683 (1974).
[13]520 U.S. 621 (1997).

In the fifth Chapter, Gerhardt explains multiple functions of Precedent in which constraint is one of the multiple functions that judicial and non-judicial precedent follows. In addition to its constraining force, Gerhardt highlights precedent as a mode of constitutional method, through which judges resolve legal disputes, precedent acts like a binding and persuasive principle, it also acts like a means of facilitating constitutional dialogue between the Court and other non-judicial actors. Non- judicial precedents have played major role in U.S. history as in *Dred Scott v. Standford*[14]it was held that black people, regardless of whether they were enslaved or free, could not be considered citizens of the U.S.A. As a consequence, they could not enjoy the rights and privileges that the Constitution confers upon American citizens. The decision led to the Civil War. After the Union's victory in 1865, the Court's rulings in *Dred Scott* was declared void by Thirteenth Amendment to the U.S. Constitution, the authority abolished slavery, and the Fourteenth Amendment, guaranteed citizenship for all persons born or naturalized in the U.S. subject to the jurisdiction thereof. In *Bush v. Gore*[15]the decision did not settle a dispute rather by trying to resolve the dispute and preempting any political solution, the Court became a part of the dispute.

Judicial decisions reflect the attitudes of a particular historical period. Justices and non-judicial authorities, for that matter cannot stand apart from the culture, society, and historical period in which they live. The Court's decisions are not only shaped by the values of the society in which the Court operates, but also shape those values. The author has mentioned numerous cases of U.S. to support his argument but no mention of Indian case has been found.

In later parts, author mentioned four additional functions of precedent. First, precedent is sometimes described as the Court's medium for educating the public about the Constitution. Second, precedent can be invested with symbolic meaning as a part of a larger social movement or historical period. Third, judicial and non-judicial precedent plays a key role in constructing American national identity. Fourth, precedent can serve as the Court's effort to articulate or defend constitutional values. Gerhardt is right in noting that each of these functions plays an important role in making a just society.

[14]60 U.S. 393 (1857).
[15]531 U.S. 98 (2000).

In the final sixth Chapter Gerhardt examines "super precedents." These are the judicial decisions or non-judicial precedents that are so deeply embedded in our law and culture that they have become practically immune to overturning. The first best example of super precedents that established the power of judicial review is *Marbury v. Madison*[16]and *Martin v. Hunter's Lessee*[17]. The next group of super precedents established by Gerhardt is "foundational doctrine". These involve cases relating to incorporation of the Bill of Rights against the states and non-justiciability of political questions. Gerhardt also discusses many foundational decisions, which he views as the most potentially controversial super precedents. Foundational decisions are longstanding, often cited, enjoy social approbation, and are viewed by courts as well-settled decisions of upholding the constitutionality of the matter in question. Similarly, the Civil Rights Act of 1964 and the Sherman Antitrust Act of 1890 are examples of "super-statutes as per the author.[18]

In the conclusion, Gerhardt says consideration of judicial and non-judicial precedent is necessary for accurate understanding of constitutional law of U.S. and through this understanding we can agree with some particular precedents, but we cannot disagree or break away from the concept of precedent, as it is as indispensible part of law making and adjudicating.

[16]5 U.S. 137 (1803).
[17]14 U.S. 304 (1816).
[18] William N. Eskridge, Jr., & John Ferejohn, *Super Statutes, p. 50 Duke L. J*. 1215 (2001).